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No. 06-263

IN THE
SUPREME COURT OF THE UNITED STATES

Rachel Haas, Carol Haas, and Richard Haas
Petitioners,

v.

Quest Recovery Services, Inc. and State of Ohio
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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REPLY

I The Opinion of the Sixth Circuit Court of Appeals squarely conflicts with decisions of the Ninth and Eleventh Circuit Courts of Appeal and unjustifiably subverts Congressional intent to redress all forms of governmental handicap discrimination through Title II of the Americans with Disabilities Act.

In urging this Court to deny the Writ, Respondent, State of Ohio, has continued to insist that the sixty (60) paragraph First Amended Complaint fails to state a potentially valid claim for relief under Title II of the Americans with Disabilities Act (ADA). Like the Sixth Circuit, the analysis that has been employed focuses exclusively upon whether Respondent can be held liable for the "direct discrimination" perpetrated by Defendant, Quest Recovery Services, Inc. (hereinafter "Quest"). This theory of recovery was largely obviated once Petitioners, Respondent, and Quest reached their partial settlement in the District Court. At no time in the Petition for Writ of Certiorari was it suggested that Petitioners were still attempting to hold Respondent liable for Quest's acts and omissions.

District Judge James S. Gwin had properly recognized that there are two (2) aspects to the First Amended Complaint. He explained that:

> Plaintiffs offer two core allegations. *** First, Ohio committed "direct disability discrimination" when Judge Kubilus ordered Rachel Haas to confinement in a private facility that lacked accommodations for the disabled. Second, Ohio did not meet its obligations as the owner of the property used by Quest. [citation omitted]

Petition for Writ of Certiorari, Appendix, p. 26c. The District Court concluded that the pleading failed to sufficiently detail how

Respondent could be held liable for Quest's "direct disability discrimination" under the circumstances. *Id., pp. 27c-28c.* District Judge Gwin also observed that the claim of "direct disability discrimination" centered upon Municipal Judge Kubilus' sentencing order and, as a result, was barred by absolute judicial immunity. *Id., pp. 28c-29c.*

The reason Petitioners were allowed to proceed with their Title II claim against Respondent was that the District Court had determined that the second theory of recovery was potentially viable. *Petition for Writ of Certiorari, Appendix, p. 29c.* He concluded that:

> Plaintiffs fare better on their claim regarding Ohio's obligations as the owner of the property. Plaintiffs allege that Ohio owns the Quest facility. ¶ 14. In *Johnson v. City of Saline,* 151 F.3d 564, 571 (6th Cir. 1998), the Sixth Circuit addressed the obligations of property owners under Title II and the Rehabilitation Act and held that "public entities have a duty to provide accessible facilities even when those facilities are used by contractors." As in *Johnson*, "[Ohio] definitely is a landlord, required by Title II to reasonably accommodate the disabled public." *Id.* at 572. [emphasis added]

Petition for Writ of Certiorari, Appendix, p. 29c. The acts and omissions of Quest are completely immaterial to this alternative aspect to of the case. By the summary judgment stage of the proceedings, it was undisputed that (1) Respondent owned the building, (2) the building was being used by members of the public, and (3) the building was not handicap accessible. *Plaintiffs' Memorandum in Opposition to Defendant State of Ohio's Motion for Summary Judgment filed October 13, 2004.* Respondent remains fixated with the "direct disability discrimination" claim that was discarded long ago precisely because the State has no defense to the of violations of the duties

owed by property owners and landlords under *Johnson*, 151 F.3d 564.

In no uncertain terms, the First Amended Complaint specifically disclosed that liability was being sought against Respondent as permitted by *Johnson*, 151 F.3d 564. Paragraph 14 established that the facility "was constructed, owned, and/or maintained by the State." *Petition for Writ of Certiorari, Appendix, p. 49e.* It was further maintained in paragraph 37 that Municipal Court programs and activities were being conducted in the building. *Id., pp. 53e – 54e.* The most significant allegations were set forth in paragraph 38, but Respondent has redacted them from the "quotation" that has been furnished to this Court.[1] *Respondent's Brief, p. 6.* The deleted portion stated:

> 38. In the manner aforementioned, the Court and/or State violated ADA Title II by failing to ensure that Plaintiff was able to participate in and benefit from the services, programs, and activities that were being furnished to non-handicapped individuals. ***

Petition for Writ of Certiorari, Appendix, p. 54e. Respondent only provided this Court with the portion of the paragraph

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[1] Respondent appears to be following the Sixth Circuit's lead in this regard. The entire first sentence of paragraph 38 is missing from the "quotation" set forth in the opinion. *Petition for Writ of Certiorari, Appendix, p. 9a.* Significant language was also removed from the second sentence, leaving the appearance that the alleged discrimination was limited to "ordering [Plaintiff] to be confined in a privately operated system [Quest]." *Id.* The appellate court was then able to conclude from the redacted version of paragraph 38 that Plaintiffs were only claiming "direct disability discrimination" arising from a judicial order and not for violating handicap accessibility requirements as permitted by *Johnson*, 151 F.3d at 572. *Id.* No suggestion was ever made that the deleted allegations were irrelevant, conclusory, or otherwise improper. No such argument had been advanced by Respondent in the Final Brief that was served on July 7, 2005. By all appearances, the appellate court simply re-worked the First Amended Complaint in order to permit a desired result.

alleging "direct disability discrimination", which was abandoned by Petitioners long ago. When viewed in their entirety, the detailed allegations appearing in the First Amended Complaint are more than sufficient to satisfy the liberal pleading requirements imposed by *Fed. R. Civ. P. 8(a). In re NationsMart Corp. Sec. Lit.*, 130 F.3d 309, 315-316 (8th Cir. 1997); *New York State Waterways Assn. v. Diamond*, 469 F.2d 419, 421 (2nd Cir. 1972).

Respondent contends that:

> As the United States correctly asserts, the Sixth Circuit affirmed the District Court holding that Petitioner Haas failed to state a claim against the State of Ohio under Title II. [citation omitted]

Respondent's Brief, pp. 3-4. This statement is obviously incorrect. District Judge Gwin had actually ruled that the First Amended Complaint did allege a potentially viable claim for relief under Title II against the State as a landlord. *Petition for Writ of Certiorari, Appendix, p. 29c.* The Sixth Circuit appeared to disagree on the grounds that Petitioners had "not satisf[ied] our pleading requirement under *Johnson* for imposing liability on the State of Ohio." *Id., p. 9a.*

First and foremost, there was no occasion for the appellate court to impose a heightened pleading standard upon Petitioners. While Fed. R. Civ. P. 9 prescribes such burdens in certain types of cases, ADA claims are not amongst them. Petitioners were not obligated to plead legal theories or allege every minutia of their causes of action, particularly given that they had not yet completed their investigation of the matter.[2] *McDonald v.*

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[2] In conducting their fly-speck scrutiny of the First Amended Complaint, both Respondent and the Sixth Circuit neglected to consider that District Judge Gwin had ordered that all amendments to the pleadings had to be submitted by June 15, 2004, which was still early in the proceedings. *R. 23, Case Management Conference Plan/Order dated June 9, 2004.* The First Amended Complaint was filed on June 11, 2004 in accordance with this directive. At that point, Petitioners and their architectural expert, William

Household Intern., 425 F.3d 424, 427 (7th Cir. 2005); *Crull v. Gem Ins. Co.*, 58 F.3d 1386, 1391 (9th Cir. 1995).

The appellate court's reference to the "requirements under *Johnson*" was apparently drawn from the portion of that opinion which "enumerated four factors to identify whether a facility appearing to have both public and private features is an arm of the state." *Petition for Writ for Certiorari, Appendix, pp. 8a – 9a.* Initially, it should be observed that it was never suggested in *Johnson*, 151 F.3d 564, that these "factors" had to be specifically alleged in order to survive a motion to dismiss. More importantly, the *Johnson* Court had simply cited the factors as part of an alternative explanation for how liability could be imposed under the ADA. *Id.*, 151 F.3d at 572. The panel had already concluded that "the city definitely is a landlord, required by Title II to reasonably accommodate the disabled public." *Id.* The four factors were relevant only to determine whether a public access cable station was also a "public entity". *Id.* Since it is beyond dispute that Respondent (State of Ohio) is a "public entity" as defined by 42 U.S.C. §12131(1) and "definitely is a landlord" pursuant to its lease agreement, there was no need for Petitioners to allege anything further under this aspect of *Johnson*.

Since Petitioners had indeed alleged a potentially viable Title II claim against Respondent, as the District Judge properly determined, the pivotal question then becomes whether Eleventh Amendment immunity is applicable. Petitioners have always agreed with Respondent that the *Johnson* claim sounds strictly in equal protection.[3] *Respondent's Sixth Circuit Final Brief, p. 21.*

Hecker, AIA, had not yet been able to conduct an inspection of the facility at issue. Shortly after they were permitted to do so by Respondent, detailed reports were issued specifically identifying numerous federal ADA accessibility requirements that had not been followed by Respondent. *Plaintiffs' Motion for Partial Summary Judgment Upon Count I, Exhibits A and B.*

[3] Respondent's reasoning strays far afield, though, with criticisms such as Petitioners' "complaint did not allege the violation of *any* constitutional right by *any* state entity, and therefore has not invoked Congress' power to

The critical allegation contained in paragraph 38 of the First Amended Complaint that the: "*** State violated ADA Title II by failing to ensure that Plaintiff was able to participate in and benefit from the services, programs, and activities that were being furnished to non-handicapped individuals" forms the basis for the equal protection claim. Since a rational basis for the State's decision not to furnish handicap accessible Driver Intervention Program (DIP) facilities has never been offered, Section 1 of the Fourteenth Amendment has indeed been infringed. *Cleburne v. Cleburne Living Cntr.*, 473 U.S. 432, 448, 105 S.Ct. 3249, 3258, 87 L.Ed.2d 313 (1985). In accordance with the opinion that was recently issued in *United States v. Georgia*, 546 U.S. 151, 126 S.Ct. 877, 881-882, 163 L.Ed.2d 650 (2006), Section 5 plainly permits such "actual violations" to be remedied and there is no need for any inquiry into the "congruence and proportionality" of Congress' efforts to eradicate handicap discrimination prophylactically.[4] It is thus apparent that the Sixth Circuit has held that a fundamental portion of a legislative enactment is unenforceable in direct contravention of this Court's precedents.

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enforce the Fourteenth Amendment." *Respondent's Brief, p. 2.* When has any court ever held that legislative authority is dependent upon the terms employed in a pleading? Rather obviously, Petitioners did not seek relief for violations of their "constitutional right[s]" under 42 U.S.C. §1983 because it is well-settled that the Eleventh Amendment does bar such claims. *Edelman v. Jordan*, 415 U.S. 651, 94 S.Ct. 1347, 39 L.Ed.2d 662 (1974); *Alabama v. Pugh*, 438 U.S. 781, 782, 98 S.Ct. 3057, 3058, 57 L.Ed.2d 1114 (1978). This immunity has been overridden for purposes of Title II of the ADA (at least in the First, Ninth, and Eleventh Circuits) and the claim of discrimination against Respondent was thus predicated strictly upon this federal statute.

[4] While Respondent has taken Petitioners to task for not mentioning the *Georgia* decision, the same can also be said of the Sixth Circuit. *Respondent's Brief, p. 7.* In urging this Court to reverse that ruling, the United States has observed that: "Although *Georgia* was decided two months before the court of appeals' decision in this case and involved a similar challenge to the operation of correctional facilities and programs, the court of appeals did not discuss or cite the case in its decision." *Brief for the United States as Intervenor, p. 8.*

The Brief for the United States as Intervenor forcefully demonstrates that the federal appellate courts are now split over whether Congress is confined to just remedying discrimination that also entails due process concerns. A number of state governments (including Ohio) can now violate the ADA while remaining secure in the knowledge that even a successful lawsuit will result in nothing more than a "cease and desist" order. See, *e.g. Klinger v. Director Dept. of Rev., State of Missouri*, 455 F.3d 888 (8th Cir. 2006) (finding the Missouri violated the ADA but prohibiting any recovery of discriminatory parking fees that had been charged). The full range of remedies that Congress included in Title II can be enforced against them only in the rare instance that the violation involves a due process claim over "right of access to courts". *Petition for Writ of Certiorari, Appendix, p. 12a.*

The Sixth Circuit's "due process only" standard was tacitly rejected a few months ago in *Toledo v. Sanchez*, 454 F.3d 24 (1st Cir. 2006). Even though a student suffering from schizoaffective disorder had not established that he had been denied access to the courts, the First Circuit concluded that his ADA claim against a state university was viable since the congressional response to pervasive handicap discrimination in public education satisfied the "congruence and proportionality" test identified in *City of Boerne v. Flores*, 521 U.S. 507, 117 S.Ct. 2157, 138 L.Ed.2d 624. *Toledo*, 454 F.3d at 40.

Like the decisions that have been promulgated by the Ninth and Eleventh Circuits, *Toledo* is irreconcilable with the Sixth Circuit's view that states cannot be held accountable for their ADA violations under Title II so long as they allow the disabled to access the courthouses. *Phiffer v. Columbia Riv. Corr. Inst.*, 384 F.3d 791, 792-793 (9th Cir. 2004); *Association for Disabled Americans v. Florida Intl. Univ.*, 405 F.3d 954 (11th Cir. 2005). Since Petitioners had not just alleged, but had also established during the summary judgment proceedings, that the State of Ohio also discriminates by failing to furnish handicap accessible DIP facilities, this Court should accept this opportunity

to resolve the deep rift that has developed amongst the federal appellate courts.

II. The Sixth Circuit's overly expansive view of absolute judicial immunity now permits governmental entities in that jurisdiction to discriminate with impunity against anyone who is subject to a judicial order.

Respondent's "absolute judicial immunity" argument does not justify a denial of the writ that has been requested. *Respondent's Brief, pp. 4-5.* Again, District Judge Gwin applied this defense only with respect to the first theory of "direct disability discrimination". *Petition for Writ of Certiorari, Appendix, pp. 28c – 29c.* Petitioners were still allowed to proceed with not only their *Johnson* theory under Title II, but also the Rehabilitation Act claim that was settled with Respondent shortly before trial. *Id., pp. 24c – 25c & 29c.* The Sixth Circuit affirmed without intimating that the immunity extended beyond the allegations of "direct disability discrimination." *Id., pp. 6a – 7a.*

The *Johnson* claim simply is not susceptible to Respondent's contention that:

> The only direct state actor in the drama is the state municipal court judge who sentenced [petitioner] to the private rehabilitation program that allegedly discriminated against her.

Respondent's Brief, p. 1. Municipal Judge Kubulis never ordered that Plaintiff had to be confined in a non-handicap accessible facility, and he would undoubtedly be offended by any suggestion that he did so. The decision to ignore the ADA regulations applicable to owners of public buildings was made solely by officials in the Ohio Department of Alcohol and Drug Addiction Services (ODADAS). *Plaintiffs' Motion for Partial Summary Judgment Upon Count I filed August 30, 2004, pp. 3-6.* Municipal Judge Kubulis was hardly to blame for the

reprehensible conditions that Plaintiff suffered during her participation in the program and the doctrine of absolute judicial immunity has no conceivable application in this instance. None of the authorities that Respondent has cited even remotely suggest that the existence of a sentencing order, by itself, implicates absolute judicial immunity and precludes the criminal defendant from taking issue from the conditions of the confinement.

Petitioners had previously warned that "the appellate court's short-sighted ruling paves the way for the creation of special prisons for blacks, Hispanics, Arabs, and other minorities. So long as a judge has ordered the individual to be confined in a segregated facility 'absolute judicial immunity' will preclude even a constitutional claim from being filed ***." *Petition for Writ of Certiorari, pp. 18-19 (footnote omitted).* Respondent does not dispute this. As if to underscore Petitioners' point, the State has reemphasized "that absolute judicial immunity applies with undiminished force even when the judge is accused of discriminating on the basis of race in violation of 42 U.S.C. §1983 ***." *Respondent's Brief, pp. 4-5.* The parties are thus in agreement that Respondent's interpretation of the Sixth Circuit's opinion will allow unfettered governmental discrimination against anyone who happens to be subject to a valid court order. Before countless citizens are victimized, this Court should intervene and confirm that absolute judicial immunity has no application to administrative and ministerial decisions over whether buildings and facilities will be made handicap accessible. See generally *Ex parte Commonwealth of Virginia,* 100 U.S. 339, 348, 25 L.Ed. 676 (1879); *Forrester v. White,* 484 U.S. 219, 227-229, 108 S.Ct. 538, 98 L.Ed.2d 555 (1988); *Duvall v. County of Kitsap*, 260 F.3d 1124, 1133-1135 (9th Cir. 2001).

CONCLUSION

Respondent's Brief in Opposition is devoted almost entirely to a Title II theory that was no longer pursued after the partial settlement was reached. With regard to its obligation as a building owner and landlord, the State has remained relatively silent. Petitioners have not only alleged such a claim within the parameters established by *Johnson*, 151 F.3d 564, but have also presented admissible evidence complying with *Fed.R.Civ.P. 56(e)* in support of each of the essential elements during the summary judgment proceedings. Notwithstanding Respondent's and the Sixth Circuit's inappropriate fixation with overly-technical pleading "requirements", the decisive issues in this case are whether (1) Congress is empowered to abrogate Eleventh Amendment immunity for Title II claims sounding strictly in equal protection and (2) absolute judicial immunity applies to the decisions of State officials to flout federal handicap accessibility requirements. Granting the Writ will permit this Court to resolve a split of authority amongst the Circuit Courts and rectify the alarming precedents that have been established.

Respectfully submitted,

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